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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Phoenix Assurance Company of Canada, Norwich Union Fire Society, Ltd., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanesa Mutual Insurance Company,

Respondents,

v.

Clayton E. Runck, Jr., Herman Sobania and George Schulz,

Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant in a civil case, in which an insurance company seeks a refund of losses paid on an insurance policy and alleges that the defendant committed arson, may be compelled to answer potentially incriminating questions, where he has consistently claimed the privilege against self incrimination under state and federal law.
2. Whether the protection, provided by the Fifth and Fourteenth Amendments to the United States Constitution, against self incrimination can be invoked to protect an American citizen against self incrimination as to crimes committed in a foreign country, in this case Canada.

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## OPINIONS BELOW

The opinion of the Supreme Court of North Dakota is reported at 317 N.W.2d 402. It is appended hereto as Appendix A. Appendix B consists of the recent order of the United States District Court for the District of Minnesota, reversing the prior order releasing testimony of the Grand Jury by two of the petitioners, testimony which was turned over to the plaintiffs in the present civil action. This is a reversal on an issue which the North Dakota Supreme Court refused to consider.

## JURISDICTION

The statutory provision believed to confer on this court jurisdiction to review the judgment in question is 28 U.S.C. § 1257(3). The opinion was rendered on March 22, 1982, and became final 17 days thereafter.

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. V: "No person . . . shall be compelled, in any criminal case, to

be a witness against himself, . . ."

U.S. CONST. amend. XIV, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

The second amended complaint of the respondents (plaintiffs in the original action in the state courts of North Dakota) alleges that the petitioner Runck owned property in Starbuck, Manitoba, Canada, which was destroyed by a fire as a result of arson, that the three respondents knew of and participated in the arson and fraudulently concealed its existence from the insurance companies, thereby defrauding the insurance companies of $75,715. The allegations were denied by the defendants,

and discovery proceedings, including the taking of depositions and serving of interrogatories, took place. The respondents have consistently claimed the fifth amendment privilege against self incrimination, moved for a protective order, opposed motions for discovery made by the respondent insurance companies, and moved to suppress a grand jury transcript released by the Assistant United States Attorney for the District of Minnesota to the insurance companies (the subject of the order in Appendix B).

The petitioners resisted all efforts by the respondent insurance companies compelling them to testify as to matters tending to incriminate them in the alleged arson in Canada. The privilege was asserted against questions which included: the fire in Manitoba, the ownership of the property, the setting of the fire, the insurance proceeds, and other matters specifically related to the alleged crime and events leading up to it. See, e.g., requests for admission dated

May 29, 1981 (Appendix D).

The District Court of Cass County, North Dakota, eventually denied all of the motions of the petitioners in which their fifth amendment rights were asserted, and granted the motions of the respondent insurance companies to compel answers by the petitioners. The petitioners thereupon appealed the order of the Cass County District Court to the North Dakota Supreme Court, which affirmed the rulings of the District Court.

The federal constitutional questions were raised, a record made, and the points preserved for appeal at every stage. A related issue arises because of the disclosure of grand jury testimony given by two of the petitioners (Runck and Schulz) after being granted immunity from prosecution by the federal court. Without any showing of particularized need, the district judge allowed the release of the transcripts to the respondent insurance companies and they were turned over to, and used by, the

respondent insurance companies. More recently, another federal judge (Devitt) revoked the prior order, but the disclosure had already been made. A copy of the latter order is attached as Appendix B.

In the present case, none of the reasons for not reaching the main issue--whether the privilege against self incrimination applies against foreign prosecutions--is present. Grand jury secrecy has been breached, the danger is real, and the crime, if any, occurred on Canadian soil and is subject to to extradition.

## REASONS FOR GRANTING THE PETITION

### POINT I--THE PRIVILEGE AGAINST SELF INCRIMINATION SHOULD BE HELD TO APPLY TO PROTECT AMERICAN CITIZENS AGAINST SELF INCRIMINATION AS TO ALLEGED CRIMES COMMITTED IN CANADA. THIS COURT HAS NEVER SPECIFICALLY RULED ON THE QUESTION. THE DECISION OF THE SUPREME COURT OF NORTH DAKOTA IN THIS CASE AND SOME FEDERAL DECISIONS DENY THE PRIVILEGE AGAINST SELF INCRIMINATION, WHILE OTHER FEDERAL DECISIONS SUPPORT IT

The Supreme Court of the United States has never reached the constitutional question

of whether the fifth amendment privilege against self incrimination extends to a foreign prosecution. It has indicated that such a constitutional question would be presented if the matters inquired into might incriminate the witness under foreign law and would pose a substantial risk of foreign prosecution. Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 92 S. Ct. 1670, 32 L.Ed. 234 (1972).

Most federal courts have recognized that the privilege against self incrimination may be invoked when a foreign prosecution is possible, although they have been split on the factual application of when this privilege exists. See In re Parker, 411 F.2d 1067 (10th Cir. 1969), vacated as moot sub nom., Parker v. United States, 397 U.S. 96 (1970); In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972). See also Note, Fear of Foreign Prosecution and the Fifth Amendment, 58 Iowa L. R. 1304 (1973). Federal cases which recognize the privilege against self

incrimination when foreign prosecution is possible include In re Grand Jury Subpoena of Martin Flanagan, 533 F. Supp. 957 (E.D.N.Y. 1982);
Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981);
In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972).

In Flanagan, a case which is factually similar to the extent that the possible crime occurred on foreign soil and that "no allegation of a pending prosecution" was made, 533 F. Supp. at 964, the court held that Mr. Flanagan's fear of foreign prosecution was reasonable and that the privilege against self incrimination extended to possible foreign prosecutions. Id. at 965.

The court went on to quote Judge Newman in Cardassi when he stated that "Zicarelli does not appear to require any indication that a foreign prosecution is imminent." ID. at 964 (citing In re Cardassi, 351 F. Supp. at 1085).

Several of the courts of appeals have impliedly recognized that the privilege may apply to a foreign prosecution situation. See In re Baird, 668 F.2d 432 (8th Cir. 1982); In re Federal Grand Jury Witness, 597 F.2d 1166 (9th Cir. 1979); United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977); In re Grand Jury Proceedings, 559 F.2d 234 (5th Cir. 1977). In all of these cases the issue was not really decided because the court found the claim of incrimination to be too remote, or speculative, or because the court relied upon the secrecy of the grand jury proceedings or the acts in question occurred on American soil. Obviously, in the present case none of these considerations apply. The alleged arson occured in Canada and the secrecy of the grand jury has been breached. As for the likelihood of prosecution see discussion under point 3.

Cases holding to the contrary and refusing to recognize the right of self incrimination against foreign prosecution

include In re Parker, 411 F.2d 1067 (10th Cir. 1969), vacated as moot sub nom., Parker v. United States, 397 U.S. 96 (1970), and criticized quite severely in Testimony Incriminating Under the Laws of a Foreign Country--Is There a Right to Remain Silent?, 11 N.Y.U. J. Int'l L. & Pol., 359 (1978). The decision appealed, of course, follows the latter line of cases. The question is one which, at some time, must be and should be resolved by this court.

POINT II--ARSON IS A FELONY IN CANADA, THERE IS NO STATUTE OF LIMITATIONS IN CANADA AS TO FELONIES, AND ARSON IS AN EXTRADITABLE OFFENSE UNDER THE TREATIES BETWEEN CANADA AND UNITED STATES

Arson is a crime under Canadian law. See Chapter C-34, Revised Statutes of Canada, Sections 389 and 390, and Chapter E-21, Revised Statutes of Canada. There is no statute of limitations limiting prosecution for the crime of arson. See Canadian Abridgement (2nd edition), Volume 11, Criminal Law, Section 9889, 1968 publication,

which reads as follows:

> "Section 9889. General Rule. Unless there is a statutory provision for it, there is no time limitation on prosecution for an offense. At the common law, no time runs against the Crown."

Arson is an extraditable offense under the extradition treaty between the United States and Canada, Article 2, dated December 3, 1971. The treaty is conveniently found at 27 United States Treaties 983, and Arson is specifically mentioned as an extraditable offense at No. 20 of the Schedule at pages 997-9.

"Moreover, assurances that extradition is unlikely are insufficient to protect a witness." Flanagan, 533 F. Supp. at 965. The possibility that extradition could occur and that the petitioners could be prosecuted in that foreign country should be sufficient to trigger the privilege.

Thus, it is very clear that answering the questions posed by the respondent insurance companies would subject the

petitioners to a real danger of prosecution under the laws of Canada. Arson is a crime punishable by imprisonment in Canada and subject to extradition as required by international treaty. It is equally evident that no statute of limitations would prevent either the prosecution or the extradition. Therefore, the petitioners are subjecting themselves to the possibility of prosecution by answering the posed questions.

POINT III--A STATEMENT BY THE CANADIAN CROWN PROSECUTOR THAT HE HAS NO PRESENT ITENTION OF PROSECUTING THE PETITIONERS IS NOT A SUFFICIENT BASIS FOR HOLDING THAT THERE IS NO DANGER OF PROSECUTION

In an attempt to avoid the obvious danger of prosecution under Canadian law, the respondent insurance companies have obtained an affidavit from a Crown Attorney with the Department of the Attorney General for the Province of Manitoba, Canada, dated November 24, 1980, stating "that the Department of the Attorney General for the Province of Manitoba has no present intention of

initiating prosecution and/or extradition proceedings in regard to said fire."

Obviously, this would not preclude the Office of the Attorney General from changing its mind, the government of Manitoba could be changed at any time under it's parliamentary system of government, or the present Attorney General could resign. In any such case, the intention of the prosecution might very well change. As noted by the 7th Circuit in In re Corrugated Container Antitrust Litigation, 661 F.2d 1145 (7th Cir. 1981) (rehearing en banc), a non-binding letter of intent is not dispositive of a constitutional issue. Fifth Amendment rights cannot be stripped away based on tenuous predictions of future events. Constitutional rights are too vital to be sacrificed to such predications. Id. at 1152. See also, Note, 13 U. Mich. J. L. Rev. 435 (1980); Flanagan, 533 F. Supp. 957 (E.D.N.Y. 1982).

Under any test, the danger is real. But it need not be certain or even likely.

The 7th Circuit in In re Folding Carton Antitrust Litigation, 609 F.2d 867 (7th Cir. 1979), concluded that "it is only when there is but a fanciful possibility of prosecution that a claim of Fifth Amendment privilege is not well taken." In this case the risk is far more than fanciful. It is real. The privilege should be sustained or the Constitution will be subverted.

POINT IV--THE FACTORS UPON WHICH THE NORTH DAKOTA SUPREME COURT RELIED IN RULING AGAINST THE PETITIONER CANNOT MAKE CONSTITUTIONAL THAT WHICH IS UNCONSTITUTIONAL

The opinion of the Supreme Court of North Dakota, although far from clear, seems to base its conclusion upon such factors as (1) that the petitioners did not raise the possibility of foreign prosecution when they were granted immunity from prosecution in the federal courts in Minnesota, and (2) that the drafters of our Constitution did not take into account the possibility of foreign prosecution when they drafted the Fifth Amendment.

The latter point is effectively answered by Murphy v. Waterfront Commission, 378 U.S. 52 (1964), where the history of the common law privilege was outlined in detail. See also Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981).

On the first point, the law is that the right to the testimony of a person granted immunity is only co-extensive with the immunity granted. See United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979).

The United States District Court for the District of Minnesota can give immunity from federal prosecution and from state prosecution, under Murphy v. Waterfront Commission, supra, but it cannot give immunity from prosecution in a foreign country. The privilege therefore continues to exist as to foreign prosecution.

Incidentally, the lower court in North Dakota decided the case on the basis of a overruled precedent. See Appendix C.

It relied on In re Folding Carton Antitrust Litigation, 465 F. Supp. 618 (N.D. Ill.), reversed 609 F.2d 867 (7th Cir. 1979). Nevertheless, the Supreme Court of North Dakota, using other and equally dubious standards affirmed it.

## CONCLUSION

The Fifth and Fourteenth Amendments prohibit compulsory self incrimination. Federal and state courts are in disagreement on whether the privilege extends to self incrimination as to a foreign prosecution.

In this case the petitioners, if they answer the questions being asked them in the state court proceedings, are in danger of incriminating themselves as to the crime of arson allegedly committed in Canada. Arson is a felony, and there is no statute of limitations. It is extraditable under the treaties between the United States and Canada. The only indication that they may not be prosecuted is non binding statement

of the present intention of a prosecutor in Canada, far from enough to remove the justifiable fear of prosecution by the petitioners.

The Supreme Court of North Dakota has affirmed a lower court judgment requiring the petitioners to answer questions which will tend to incriminate them in the commission of the crime of arson in Canada.

This Court should grant certiorari to the Supreme Court of North Dakota, and should decide the issue left open in Zicarelli, whether the constitutional privilege against self incrimination extends to foreign crimes, and should upon the merits decide that it does so extend, thereby guaranteeing the constitutional rights of American citizens.

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